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E.F., Appellant)	
)	
and)	Docket No. 21-0381
)	Issued: May 23, 2022
U.S. POSTAL SERVICE, PROCESSING &)	
DISTRIBUTION CENTER/FACILITY,)	
Bellmawr, NJ, Employer)	
)	

Case Submitted on the Record

³ The Board notes that, following the August 26, 2020 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met his burden of proof to expand the acceptance of his claim to include the additional conditions as causally related to the accepted November 17, 2006 employment injury.

FACTUAL HISTORY

On November 27, 2006 appellant, then a 53-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on November 17, 2006 he sustained an injury to his left leg when loading his truck while in the performance of duty. On April 23, 2007 OWCP accepted the claim for aggravation of preexisting sciatica. Appellant underwent OWCP-authorized anterior lumbar interbody fusion with allograft and autograft L3-4, L4-5, and L5-S1, complete discectomy L3-4, L4-5, and L5-S1, C-arm fluoroscopic guidance, intraoperative neuromonitoring, insertion of PEEK implant L3-4, L4-5, and L5-S1, application of plate and screws anteriorly L3-4, L4-5, and L5-S1, bone marrow aspirate left anterior and iliac crest, placement of Vancomycin powder, Foraminotomies bilateral L3-4, L4-5, and L5-S1, and intraoperative neuromonitoring on October 5, 2012. OWCP paid him wage-loss compensation on the supplemental rolls commencing August 31, 2012 and on the periodic compensation rolls as of March 10, 2013.

In a progress report dated April 12, 2018, appellant's treating physician, Dr. Steven Valentino, an osteopath and a Board-certified orthopedic surgeon, diagnosed unspecified thoracic, thoracolumbar and lumbosacral intervertebral disc disorder, lumbar facet joint syndrome, lumbar degenerative joint disease (DJD), and lumbar spondylosis without myelopathy or radiculopathy. Dr. Valentino opined that appellant's "ongoing symptoms and need for treatment are causally related to [appellant's] work injury."

In a January 15, 2020 attending physician's report (Form CA-20), Dr. Guy Fried, an osteopath and a Board-certified physiatrist, diagnosed appellant with intervertebral disc disorders, which he opined, with a checkmark "Yes," was caused or aggravated by an employment injury.

On January 15, 2020 OWCP referred appellant for a second opinion examination, along with a statement of accepted facts (SOAF), a set of questions and, the medical record to Dr. Stanley Askin, a Board-certified orthopedic surgeon, to determine if appellant had on going disability and need for medical care due to the November 17, 2006 employment injury. The SOAF noted appellant's October 5, 2012 surgical procedure, but did not indicate that the procedure had been authorized.

In a February 28, 2020 report, Dr. Askin noted appellant's history of injury and medical treatment, and indicated that he had reviewed the SOAF. He noted that he last saw appellant on August 16, 2013 and, at that time, thought continuing work restrictions were appropriate and should be revisited in one year's time. Dr. Askin noted that appellant had indicated on November 17, 2018 that he was the driver of a motor vehicle that hit a pole and denied any injury resulting from that occurrence. He also noted that appellant received injections from Dr. Valentino and that Dr. Fried prescribed medication. Dr. Askin noted that appellant had presented with a cane. He indicated that appellant had a normal examination with negative straight leg raising tests and negative Patrick's, Spurlings', Phalen's, Tinel's, and Finkelstein tests. Dr. Askin also indicated that there was no anatomic explanation for appellant's report of back pain when appellant moved his neck in flexion, extension, or rotation to each side fully. He reported that appellant was

neuromuscularly intact with no neurologic deficit for either upper or lower extremities. Dr. Askin diagnosed status postsurgical treatment for intervertebral disc disease and found that the only objective findings were surgical changes associated with the October 5, 2012 surgical procedure. He indicated that appellant's accepted condition of aggravation of preexisting sciatica had resolved as there was no evidence of sciatica. Dr. Askin opined that appellant could return to his date-of-injury job without restrictions as there was no objectively determinable lingering effect of the accepted injury and that there was no recent demonstration that any acute or serious condition that would justify continued medical treatment.

On March 17, 2020 OWCP requested that Dr. Askin provide a supplemental report pertaining to continued medical treatment and expansion of the claim for any of the conditions of unspecified thoracic, thoracolumbar and lumbosacral intervertebral disc disorder, lumbar facet joint syndrome, lumbar DJD, and lumbar spondylosis without myelopathy or radiculopathy.

In a March 20, 2020 supplemental report, Dr. Askin related that appellant was not suffering from any such conditions as a consequence of any factor of employment. He concluded that such conditions were not listed as "accepted" by OWCP and that he was not provided with any documentation or clinical evaluation reason why such diagnoses should be accepted as consequential to the factors of employment. Dr. Askin explained that every person who was no longer young developed (spondylosis) and/or degenerative disc disease and/or facet syndrome, not as consequences of factors of employment, but because that was a ubiquitous consequence of getting older. He indicated that, to the extent appellant has such conditions, it is an age-appropriate degenerative change. Dr. Askin explained that on examination appellant did not have any ongoing disturbance of these baseline age-related/degenerative conditions that was consequential to appellant's factors of employment.

By decision dated March 25, 2020, OWCP denied the expansion of the acceptance of his claim to include the additional diagnoses of unspecified thoracic, thoracolumbar and lumbosacral intervertebral disc disorder, lumbar facet joint syndrome, lumbar DJD, and lumbar spondylosis without myelopathy or radiculopathy. It gave the weight of the medical evidence to Dr. Askin's February 28 and March 20, 2020 opinions. OWCP also noted that Dr. Valentino offered no medically-supported rationale as to how the November 17, 2006 employment injury caused or aggravated any of the diagnosed conditions.

On March 30, 2020 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review.

In an April 21, 2020 addendum report, Dr. Askin indicated that appellant does not have a chronic pain syndrome, rather, he chronically complains of pain for which there is no physical basis and for which there is no need for continuing medical treatment. He opined that appellant's current clinical condition does not justify a prescription of any opioid medication for his accepted condition and there is no work-related or nonwork-related condition that requires any pain management.

On July 16, 2020 a telephonic hearing was held.⁴ By decision dated August 26, 2020, an OWCP hearing representative affirmed the March 25, 2020 decision.

LEGAL PRECEDENT

When an employee claims that, a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.⁵

To establish causal relationship, the employee must submit rationalized medical opinion evidence.⁶ The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the accepted employment injury.⁷ The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.⁸

ANALYSIS

The Board finds that this case is not in posture for decision.

OWCP accepted that appellant sustained an aggravation of his preexisting sciatica as a result of the November 17, 2006 employment injury. It also accepted a recurrence of disability due to an October 5, 2012 OWCP surgical procedure for anterior lumbar interbody fusion with allograft and autograft L3-4, L4-5, and L5-S1, complete discectomy L3-4, L4-5, and L5-S1, C-arm fluoroscopic guidance, intraoperative neuromonitoring, insertion of PEEK implant L3-4, L4-5, and L5-S1, application of plate and screws anteriorly L3-4, L4-5, and L5-S1, bone marrow aspirate left anterior and iliac crest, placement of Vancomycin powder, foraminotomies bilateral L3-4, L4-5, and L5-S1, and intraoperative neuromonitoring. However, OWCP denied expansion of the acceptance of the claim to include the conditions of unspecified thoracic, thoracolumbar and lumbosacral intervertebral disc disorder, lumbar facet joint syndrome, degenerative joint disease of the lumbar spine, and spondylosis of the lumbar region without myelopathy or radiculopathy, finding that the weight of the medical evidence rested with the opinion of Dr. Askin, serving as the second opinion physician.

⁴ By decision dated June 2, 2020, OWCP terminated appellant's medical and wage-loss compensation benefits, effective June 3, 2020, based on Dr. Askin's second opinion reports. By decision dated October 30, 2020, an OWCP hearing representative reversed the termination decision, finding that Dr. Askin's reports were not well-rationalized or based on an accurate SOAF.

⁵ *D.T.*, Docket No. 20-0234 (issued January 8, 2021); *see T.E.*, Docket No. 18-1595 (issued March 13, 2019); *T.F.*, Docket No. 17-0645 (issued August 15, 2018); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

⁶ *D.T.*, *id.*; *T.K.*, Docket No. 18-1239 (issued May 29, 2019); *M.W.*, 57 ECAB 710 (2006); *John D. Jackson*, 55 ECAB 465 (2004).

⁷ *D.S.*, Docket No. 18-0353 (issued February 18, 2020); *T.K.*, *id.*; *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁸ *Id.*

In his February 28, 2020 report, Dr. Askin diagnosed status postsurgical treatment for intervertebral disc disease and found that the only objective findings were surgical changes associated with the October 5, 2012 surgical procedure. He opined that appellant's accepted condition of aggravation to preexisting condition of sciatica had resolved as there was no evidence of sciatica. While Dr. Askin opined in his February 28 and March 20, 2020 reports that appellant did not have any ongoing disturbance of the baseline age-related/degenerative conditions that was consequential to his factors of employment, the Board finds that OWCP provided Dr. Askin a deficient SOAF, which failed to clearly indicate that OWCP had authorized the October 5, 2012 surgical procedure and accepted a recurrence of disability as a result. This information is relevant to the issue of the expansion claim for the requested conditions. It is well established that a physician's opinion must be based on a complete and accurate factual and medical background. When OWCP has accepted an employment condition or a surgical procedure, the physician must base his opinion on those accepted conditions.⁹

OWCP procedures and Board precedent dictate that, when an OWCP medical adviser, second opinion specialist, or referee physician renders a medical opinion based on a SOAF, which is incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.¹⁰

As noted, in his February 28, 2020 report, Dr. Askin diagnosed status postsurgical treatment for intervertebral disc disease and found objective surgical changes associated with the October 5, 2012 surgical procedure. As he did not rely on an accurate SOAF regarding the accepted conditions, the Board finds that his report and opinion pertaining to claim expansion of the requested conditions to be of diminished probative value.¹¹

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence to see that justice is done.¹² Once it undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.¹³ As Dr. Askin did not base his report on an accurate factual history, the case will be remanded to OWCP for further development of the medical evidence.

On remand OWCP shall refer appellant, a SOAF, and list of questions to a new second opinion physician in the appropriate field of medicine for a rationalized medical opinion on the

⁹ *G.B.*, Docket No. 20-0750 (issued October 27, 2020); *V.S.*, Docket No. 19-1792 (issued August 4, 2020); *T.P.*, 58 ECAB 524 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

¹⁰ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990). *See also D.C.*, Docket No. 21-0780 (issued December 22, 2021); *D.E.*, Docket No. 17-1794 (issued April 13, 2018); *K.V.*, Docket No. 15-0960 (issued March 9, 2016); *Paul King*, 54 ECAB 356 (2003).

¹¹ *Id.*

¹² *K.R.*, Docket No. 21-0083 (issued June 3, 2021); *C.R.*, Docket No. 20-1102 (issued January 8, 2021); *K.P.*, Docket No. 18-0041 (issued May 24, 2019).

¹³ *K.R.*, *id.*; *see F.K.*, Docket No. 19-1804 (issued April 27, 2020); *B.W.*, Docket No. 19-0965 (issued December 3, 2019).

expansion issue. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the August 26, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 23, 2022
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board